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NO. 74-968

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

JOE T. BARRERA,

Petitioner

V.

ROSCOE, SNYDER & PACIFIC
RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

AUBREY L. ROBERTS, JR.
MAYS, MOORE, DICKSON &
ROBERTS, INC.
P. O. Box 638
Sweetwater, Texas 79556

COUNSEL FOR PETITIONER

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The petitioner, JOE T. BARRERA, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit, entered in this proceeding on November 8, 1974.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals dated November 8, 1974, has not been reported and is attached as Appendix A (p. 19 infra). The opinion of the District Court for the Northern District of Texas, Abilene division, dated October 10, 1973, has not been reported and is separately presented as Appendix B (p. 20 infra).

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit affirming the District Court's judgment was entered on November 8, 1974. The jurisdiction of

this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

A railroad operated both tracks and repair shops prior to January 1, 1967. After that date, a wholly owned subsidiary equipment corporation carried on the business of railroad car construction and repair for both the railroad and others. Petitioner was injured while cleaning inside a car while an employee of the railroad's subsidiary equipment corporation and sought recovery for his injuries against the railroad under FELA. Questions presented relate to the status of the injured workman and his right to FELA; the conduct of the railroad in creating and thereafter controlling a subsidiary corporation and its employees; and the question of the trial court's admitting

evidence of collateral benefits in an FELA case. Those questions are:

(1) Whether the Courts below were correct in disregarding a jury finding that the employer equipment corporation was an alter ego of the railroad;

(2) Whether, in an FELA case, the Court can admit evidence that petitioner had received workmen's compensation benefits.

STATUTORY PROVISIONS INVOLVED

The Federal Employers' Liability Act, 45 U.S.C., Section 51, the pertinent parts of which are as follows:

> "Every common carrier by railroad... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce,..."

The Federal Employers' Liability Act, 45 U.S.C., Section 55, the pertinent parts

of which are as follows:

> "Any contract, rule, regulation, or devise whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void;..."

STATEMENT OF THE CASE

The petitioner filed his FELA complaint against the railroad for personal injuries sustained by him when he fell while washing the inside of a carbon black car. It was alleged that his nominal employer at the time of the injury, RSP Railway Equipment Corporation, was a subsidiary of the railroad created for the purpose of avoiding the responsibilities imposed by the FELA or, alternatively, it was the alter ego of the railroad (R. 010).

Trial was to a jury, which found that the equipment corporation was the alter ego of the railroad; that the equipment corporation was not created to enable the defendant railroad to exempt itself from the provisions of FELA; that the injured workman's employer did not fail to provide him with a reasonably safe place in which to work but did fail to provide him with reasonably safe equipment with which to work and this was responsible in part for his injuries; and that he lost earnings and earning capacity in the future to the extent of $5,000.00; and his medical expenses were $3,295.20. The verdict was filed September 27, 1972 (R. 019). The Court entered judgment October 10, 1973, over a year later, setting aside the finding of the jury that the equipment

corporation was the alter ego of the railroad and decreeing that the injured workman take nothing by his action (R. 025).

The Circuit Court of Appeals for the Fifth Circuit affirmed the trial court's judgment (Appendix A).

REASONS FOR GRANTING THE WRIT

The decisions below encroach upon the rights of employees under the FELA. They are in conflict with applicable decisions of this Court construing that statute:

1. The Courts below have failed to follow the rule that under FELA factual issues are for juries and not for judges, which has been repeatedly emphasized by this Court. This rule is not limited to issues involving

negligence or causation, but includes the issue of whether or not an injured workman was an employee of the railroad. Baker v. Texas & Pacific Railway Company, 359 U.S. 227, holds that whether an employee of an independent contractor was also an employee of the railroad and entitled to the benefits of FELA was a question for the jury.

This Court has held in Lavendar v. Kurn, 66 S.Ct. 740, 327 U.S. 645, 90 L.Ed. 916 (1946), that the jury's findings in an FELA case must stand where the following exist:

(1) When the evidentiary basis for the jury finding becomes apparent, it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

(2) The jury finding may be

disturbed "only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." 327 U.S. at page 653.

This Court announced in Wilkerson v. McCarthy, 59 S.Ct. 413, 415; 336 U.S. 53, 57; 93 L.Ed. 497 (1949) that the criteria to be used in determining whether to let a jury finding stand is: "We need look only to the evidence and reasonable inferences which tend to support the case of the litigant against whom a preemptory instruction has been given."

The Courts below have deprived petitioner of his right to a trial by jury, which is "a basic and fundamental feature of our system of federal jurisprudence" and "is part and parcel of

the remedy afforded railroad workers under the Employers' Liability Act." Bailey v. Central Vt. R. Co., 319 U.S. 350, 354.

2. The trial court erroneously admitted over objection evidence that the petitioner had received workmen's compensation benefits from his nominal employer in this matter. This evidence was received despite this Court's holding in Tipton v. Socony Mobil Oil Company, 375 U.S. 34, 11 L.Ed.2d 4, 84 S.Ct. 1 (1963) that evidence of collateral benefits may not be admitted. Again, in Eichel v. New York Central Railroad, 375 U.S. 253, 11 L.Ed.2d 307, 84 S.Ct. 316 (1963), this Court held, at page 309:

> "We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury."

In addition, the holding of the Courts below are in direct conflict with the Seventh Circuit case of Schroeder v. Pennsylvania Railroad, 397 F.2d 452 (7th Cir. 1968), which holds that workmen's compensation benefits received by the widow of a deceased truck driver was not admissible on the issue of whether he was an employee of Willet Trucking or Pennsylvania Railroad. To the same effect, there is a Fifth Circuit case, Page v. St. Louis Southwestern Railway Company, 349 F.2d 820 (5th Cir. 1965), which states at page 822:

> "Both Tipton and Eichel reflect a strong policy against the use of such collateral source evidence in FELA and analogous Jones Act-maritime law seamen's cases."

Despite the Fifth Circuit's admonition to the District Court set out above,

the trial court admitted into evidence, over objection and a previously filed motion in limine, the fact that the petitioner had received $10,000.00 in a workmen's compensation settlement and was entitled to receive necessary medical care for a period of one year from the date of the settlement (R. 104-106). The information so poisoned the jury that they not only failed to find that the creation of the subsidiary equipment corporation was not a devise to exempt the railroad from FELA liability, when all of the evidence presented at the trial demanded this conclusion, but they only awarded $5,000.00 in damages to a seriously injured workman. The jury found that the petitioner, who had been operated on for two bilateral herniated interverterbral discs and had

undergone a fusion from L-4 through the sacrum, who had worn a metal back brace 24 hours a day for nine months following the operation, who had not been released from a doctor's care at the time of trial, 16 months after the injury, and whose uncontradicted testimony was that he had not worked, was in constant pain, and was the only support of his wife and six children, suffered a loss of past earnings and future earning capacity of only $5,000.00 (R. 94, 95, 98).

The Circuit Court of Appeals for the Fifth Circuit has decided that the introduction of workmen's compensation benefits is not reversible error because the first issue to be determined is whether or not the petitioner is entitled to FELA coverage. The per curiam opinion affirms the District Court's

position that since the status of the petitioner as determined by the trial court was that he was not entitled to FELA benefits, the admission in evidence of collateral benefits was harmless error. This reasoning flies in the face of the Supreme Court holdings in Tipton and Eichel, supra.

The writ of certiorari is necessary in this case to prohibit trial courts from admitting collateral benefits in FELA cases. Additionally, circuit courts should discourage such practice rather than holding that since the trial court has concluded petitioner was not covered by FELA, the evidence admitted was harmless.

What is remarkable in this case is that the jury, despite the damaging evidence received, did

find that the equipment corporation was the alter ego of the railroad, and, accordingly, the petitioner was entitled to FELA coverage. The evidence as to this point which convinced the jury is far less persuasive than the evidence presented that the creation and continuation of the equipment subsidiary was a devise to exempt the railroad from FELA liability for subsidiary workmen. The jury must have concluded that since workmen's compensation benefits were provided equipment company employees pursuant to Texas statutes, the railroad was not trying to exempt itself from liability. An examination of the record demonstrates copious evidence which leads to the conclusion that the immediate reason for creation

of the subsidiary equipment corporation was to deny car repair employees access to FELA coverage and grant them the limited protection of Texas compensation laws, which provided $49.00 a week for 401 weeks as maximum benefits collectable for total and permanent disability.

The writ should be granted to make known to railroads they may not divide their functions into subsidiaries and deny to those subsidiary employees FELA benefits, if the purpose of such division is to limit railroad liability.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

MAYS, MOORE, DICKSON & ROBERTS, INC.
P. O. Box 638
Sweetwater, Texas 79556

By: Aubrey L. Roberts, Jr.
AUBREY L. ROBERTS, JR.

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

Three true and correct copies of this petition for writ of certiorari in the above captioned case were duly served on Roscoe, Snyder & Pacific Railway Company by mailing copies of the same to Mr. D. L. Case of the lawfirm of Jackson, Walker, Winstead, Cantwell & Miller, 4300 First National Bank Building, Dallas, Texas 75201, and Mr. James Rosser of the lawfirm of Rosser & Carroll, 206 Brownfield Building, Snyder, Texas 79549, on this the 4th day of February, 1975.

Aubrey L. Roberts, Jr.
AUBREY L. ROBERTS, JR.

Joe T. BARRERA, Plaintiff-Appellant,

v.

ROSCOE, SNYDER & PACIFIC RAILWAY COMPANY, Defendant-Appellee.

No. 73-3731.

United States Court of Appeals, Fifth Circuit.

Nov. 8, 1974.

Appeal from the United States District Court for the Northern District of Texas; Leo Brewster, Judge.

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

PER CURIAM:

We have given careful consideration to the contentions of the parties as set forth in their well-prepared briefs and further amplified at oral argument. It is our opinion that the district court arrived at the proper conclusion and that the appellant has not presented any valid basis for reversal. Accordingly, the judgment entered for appellee by the district court is affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
ABILENE DIVISION

* * *

JOE T. BARRERA	:	
	:	
VS.	:	CA-1-559
	:	
ROSCOE, SNYDER AND PACIFIC RAILWAY COMPANY	:	

* * *

MEMORANDUM OPINION AND ORDER

The questions now before the Court are raised by post-verdict and pre-judgment motions filed by each of the parties.

The plaintiff brought this action under the Federal Employers' Liability Act (FELA) against the Roscoe, Snyder and Pacific Railway Company (Railroad) to recover damages for personal injuries sustained by him while working as an employee of RSP Railway

Equipment Corporation (Equipment Corporation).

The Railroad and the Equipment Corporation were separate corporate entities. During all of its existence, the Railroad had been engaged in the business of a common carrier by railroad, as that term is used in the FELA. The business of the Equipment Corporation has been the repair and major overhaul of railroad cars for common carriers all over the country.

There was no claim that the plaintiff was an employee of the Railroad at the time of his injuries. It was stipulated that at such time he was an employee of the Equipment Corporation actually doing its work. Since the Equipment Corporation was not engaged as a common carrier by railroad, it

was eligible to, and did, carry insurance on its employees under the Texas Workmen's Compensation Act. The Railroad, of course, was prohibited from carrying such insurance. With the same lawyer representing him in his workmen's compensation claim as is representing him in this case, the plaintiff filed and prosecuted his claim for such compensation. To do so, he had to assert that he was an employee of the Equipment Corporation. With the competent representation that he had, he was able to make a good settlement of his compensation action for $10,000.00 cash, all medical expenses to the date of the settlement, and future medical expenses for services of a named doctor from the date of the settlement until a specified time in 1973.

Plaintiff sought to overcome the fact that he was not an actual employee of the Railroad on each of the following grounds:

> a. The Equipment Corporation was an alter ego of the Railroad on the date of plaintiff's injuries.
>
> b. One of the purposes of the Railroad in the creation of the Equipment Corporation was to enable the Railroad to exempt itself from liability for damages for personal injuries to its employees under the provisions of the FELA.

The case was tried before a jury, and a verdict in the form of answers to special interrogatories was returned. By such answers, the jury found:

1. The Equipment Corporation was an alter ego of the Railroad on the date plaintiff sustained his injuries.

2. The Railroad did not create the Equipment Corporation for the purpose, among others, of enabling the

Railroad to exempt itself from liability for damages for personal injuries to its employees under the provisions of the FELA.

3. The plaintiff's employer did not fail to provide him with a reasonably safe place in which to work at the time he was injured.

4. The plaintiff's employer did fail to provide him with reasonably safe equipment with which to work at the time he was injured; and such failure did play some part in bringing about or causing the plaintiff's injuries.

5. The amount of money that would reasonably compensate the plaintiff for his injuries was $5,000.00 for loss of earnings to date of trial and of future earning capacity he would in reasonable

probability sustain thereafter, together with $2,017.20 to cover his hospital bill, and $1,278.00 for his medical expenses, $645.00 of which was for the services of Dr. Kenneth Scholz and $633.00 for those of Dr. Lloyd M. Garland, all of which totalled $8,295.20.

The following motions filed after the return of the verdict are now before the Court:

1. Plaintiff's motion for judgment on the verdict as to liability of the defendant and for new trial as to damages only. By this motion, the plaintiff contends that the liability of the Railroad was established by the jury findings, but that the findings on the damage issues should not be allowed to stand. The contention as to the

damages is predicated on the fact that the jury allowed no damages for pain and suffering, even though there was no question about the fact that plaintiff sustained some injuries, and the jury found damages of $5,000.00 for loss of earnings and future earning capacity and hospital and medical expenses in the amount of $3,295.20. Plaintiff claims that a new trial can be granted as to the damage issues only, while the findings on liability are left to stand.

2. Defendant's motion for judgment notwithstanding the verdict. The grounds of this motion are that: (a) it was conceded that plaintiff was not an employee of the Railroad at the time he was injures; (b) there is no legally competent evidence to support the jury finding that the Equipment Corporation

was an alter ego of the Railroad, and (c) plaintiff waived any claim he might have had against the Railroad by successfully prosecuting his workmen's compensation claim on a theory entirely inconsistent with his claim in this case.

3. Defendant's alternative motion for judgment. This motion urges that:

(a) If there is sufficient evidence to show that Equipment Corporation was an alter ego of the Railroad, the effect of such finding would be that the two corporations were one and the same.

(b) If they are one and the same, the Railroad is entitled to credit or offset the amount of the settlement of the plaintiff's workmen's compensation claim

against his recovery on the verdict.

(c) Since the largest amount ($8,295.20) the plaintiff could possibly recover on the verdict is less than the amount of the compensation settlement ($10,000.00 cash plus medical expenses), the offset would more than cover the amount of damages allowed by the jury.

The Court is of the opinion that the Railroad's motion for judgment notwithstanding the verdict should be granted on the ground that there is no evidence to support the finding of the jury that the Equipment Corporation was an alter ego of the Railroad. In the absence of a valid finding to such effect, there is no way the Railroad could possibly be liable to the

plaintiff here. Also, the plaintiff is estopped to recover from the Railroad by having successfully asserted hisclaim for workmen's compensation from the Equipment Corporation's compensation insurance carrier.

At the conclusion of the evidence, the Railroad filed a motion for instructed verdict on the grounds, among others, (1) there was no evidence, and (2), certainly insufficient evidence to justify the submission of the alter ego issue to the jury. Even though the Court was of the opinion that the Railroad's position was correct, it followed the recommended practice of withholding action on the motion for instructed verdict and submitting the case to the jury, so that a remand for a complete new trial would be

unnecessary in the event the appellate court should disagree with the ruling on liability. Malone and Hogan Hospital Foundation v. Boston Insurance Company, 5 Cir., 378 F.2d 362 (1967)[1]; Reitan v. Travelers Indemnity Co., 7 Cir., 267 F.2d 66 (1959)[2].

1/ "Boston moved for an instructed verdict at the conclusion of the evidence. The Court was of the opinion that Boston was entitled to judgment as a matter of law but followed the recommended practice of submitting possible fact issues to the jury so that remand for a nre trial might be obviated if on appeal this court found him in error." 378 F.2d., at 363.

2/ "....[W]e hold to the view that in most cases in which a motion for a directed verdict is made at the conclusion of all the evidence, it would be better practice for the trial judge to withhold his ruling until after the jury has returned a verdict, and then, if he thinks proper, set aside the verdict as not supported by any substantial evidence and grant the motion pursuant to Rule 50(b), Federal Rules of Civil Procedure, 28 U.S.C.A., thus giving the reviewing court on appeal the opportunity to reinstate the verdict if it disagrees with him...." 267 F. 2d, at 68.

The Court has seriously reconsidered this question since the verdict was returned, and has reached the same conclusion that there was no evidence to establish that the Equipment Corporation was the alter ego of the Railroad at the time plaintiff was injured.

The stipulation previously mentioned established that plaintiff was working as an employee of the Equipment Corporation, and not the Railroad, at the time he was hurt. He was not under the direction, supervision or control of the Railroad. He was washing the inside of a railroad tank car with soap and water on the premises of the Equipment Corporation when he lost his footing due to lack of scaffolding

and fell into the hopper of the car in such manner as to cause injuries to his back. There was no claim that the Railroad owned the car or that the work was being done for it.[3/] The car was in the shop of the Equipment Corporation for repair.

The evidence established as a matter of law that the Equipment Corporation was not the alter ego or an instrumentality of the Railroad at the time plaintiff sustained his injuries. There was no ownership,

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3/ This would not be determinative as long as the Equipment Corporation was an entity independent from the Railroad. Car repair is not a non-delegable duty of a railroad.

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undue domination or control of either corporation by the other. Regular corporate procedure of each company was followed throughout. Neither one of them owned any stock in the other. No officers or directors of either corporation occupied any official position with the other. The managment and operation of each company were in different hands. Most of the business of the Equipment Corporation was with companies other than the Railroad.[4/]

4/ The Railroad did not have enough rolling stock to keep the Equipment Corporation busy. While this 31 mile railroad has always made money, it came primarily from an extremely advantageous settlement it had made with the Santa Fe in consideration of its dropping a contest of Santa Fe's application to the Interstate Commerce Commission for a certain route between Snyder and Sweetwater. The Railroad never did own much folling stock. There was a time in recent years when it owned only two locomotives and cabooses and one box car.

The Equipment Corporation was not a common carried by railroad under the FELA. It did not perform any transportation functions, switching operations or any other non-delegable duties of a rilroad. It was strictly in the business of repairing and making major alterations on rolling stock of railroads from over the entire country. It carried workmen's compensation insurance on its employees. There was no use by the Railroad of the Equipment Corporation as a subterfuge or for the perpetration of a fraud.[5/]

5/ If there was an issue of fact as to fraud and subterfuge, it was settled in favor of the Railroad by the finding of the jury in answer to Interrogatory No. 2 that the Railroad did not create the Equipment Corporation for the purpose, among others, of enabling the Railroad to exempt itself from liability under the FELA for damages for personal injuries to its employees.

Under the circumstances, the Railroad was entitled to a judgment as a matter of law. Ruberiod Co. v. North Texas Concrete Co., 5 Cir., 193F. 2d 121 (1951); Fawcett v. Missouri Pacific R.Co., D.C.W.D.La., 242 F. Supp. 675, 678, affirmed, 5 Cir., 347 F. 2d 233 (1965); Markow v. Alcock, 5 Cir., 356 F. 2d 194 (1966); Garrett v. Southern Ry. Co., 6 Cir., 278 F. 2d 424 (1960); cert. den. 364 U.S. 833; Steven v. Roscoe Turner Aeronautical Corp., 7 Cir., 324 F. 2d 157 (1963); Whayne v. Transportation Management Service, Inc., E.D.Pa., 252 F. Supp. 573, affirmed, 3 Cir., 397 F. 2d 287 (1968), cert. den. 393 U.S. 978; and Taylor v. Standard Gas and Electric Co., 10 Cir., 96 F. 2d 693, 704 (1938).

The Fifth Circuit case, Fawcett v. souri Pacific R. Co., is directly in point. That was a case brought under the FELA to recover damages for the accidental death of Floyd Fawcett. It was admitted that even though the accident resulting in his death occurred on the presmies of the railroad, he was at the time an employee of Missouri Pacific Truck Lines, Inc., a wholly owned subsidiary of the railroad. The following is quoted from the opinion of the District Court:

> "At the time of his death (1) Fawcett was not hired by the railroad; (2) he was not on the railroad payroll; (3) he was not, in fact, paid by the railroad; (4) he was not subject to discharge by the railroad; (5) he was upon the railroad premises, but those premises were the subject of a lease agreement between the railroad

and Fawcett's employer; (6) he was not using the railroad's tools; (7) the railroad furnished no material; (8) he was not doing work the railroad was required to do. His work consisted of loading and unloading which the consignee would otherwise do, in assisting in the transport of freight by highway transport for which the railroad was not licensed to do; (9) None of the railroad's employees were present at the time Fawcett met his death; and (10) none of the railroad employees had any supervision of Fawcett or his supervisors." 242 F. Supp., at 677.

In discussing the question of whether there was any evidence to support the alter ego theory of liability, the Court said:

> "As we analyze it, plaintiff's real contention is that because the trucking company is a wholly owned subsidiary of the defendant, it, the trucking company was the alter ego, adjunct, subsidiary agent, and instrumentality of the railroad. The jurisprudence as we read it is to the contrary. Atlantic Coastline R.R.Co. v. Shields, 5th Cir., 1955, 220 F.

2d 242; Garrett v. Southern R.R.Co., 6th Cir., 1960, 278 F. 2d 424; Kentucky Electric Power Co. v. Norton Coal Mining Co., 6th Cir., 1938, 93 F. 2d 923; Taylor v. Standard Gas & Electric Co., 10th Cir., 1938, 96 F. 2d 693. In a carefully considered opinion in the Kentucky Electric Power case, the Sixth Circuit stated:

"Upon the issue of whether or not the control by Southern of Lenoir was of such character as to constitute the latter a

mere adjunct of the former, the court held that no such control was evident. The following cases were cited: Kentucky Electric Power Co. v. Norton Coal Mining Co., 6 Cir., 93 F.2d 923; Atlantic Coast Line vs. Shields, 5 Cir., 220 F. 2d 242, 246; Taylor v. Standard Gas & Electric Co., 10 Cir., 96 F 2d 693.

"'In Kentucky Electric Power Company vs. Norton Coal Company, supra, 93 F. 2d at page 926, this court said:

"On the other hand, it is likewise settled that a corporation is ordinarily an entity, separate and apart from its stockholders, and mere ownership of all the stock of one corporation by another, and the identity of officers of one with officers of another, are not alone sufficient to create identity of corporate interest between the two companies or to create the relation of principal and agent or to create a representative of fiduciary relationship between the two. If such stock ownership and potential control be resorted to only for the purpose of normally participating in the affairs of the subsidiary corporation in a manner usual to stockholders and not for the purpose of taking some unfair advantage of the subsidiary or using it as a mere adjunct to the main corporation or as a subterfuge to justify

wrongdoing, their indentify as separate corporations will not be disregarded but their respective rights when dealing with each other in respect to their separate property will be recognized and maintained. The extent of stock ownership and mere potential control of one company over another has never been regarded as the determining factor in the consideration of such cases. Something must be disclosed to indicate the exercise of undue domination or influence resulting in an infringement upon the rights of the subservient corporation for the benefit of the dominant one. Otherwise, the rights of the separate corporations in respect to their corporate property must be governed by the rules applicable in ordinary cases."

"We think this is a correct statement of the law. We adopt it. Plaintiff has alerted us to avoid intercompany arrangements drawn to avoid federal jurisdiction under the FELA. We find nothing here indicative of such a purpose, but we point out as did the Third Circuit (Shaw v. Monessen Southwestern R.R.Co., 220 F.2d 841) that we should also be alert to avoid the extension of a statute applicable to railroad employees in interstate transportation to cover those engaged in other occupations. Such an extension

might well deprive a widow and children, as it would here, of their rights under a state compensation act where their right of recovery would not depend upon proof of negligence." 242 F. Supp., pp. 677-78.

In upholding the conclusion of the trial court that as a matter of law the tuck line was not an alter ego of the railroad, the Court of Appeals said:

". . . After careful consideration, we find ourselves in agreement with the opinion, findings, and conclusions of the district court . . ." 347 F. 2d, at 233.

In the Garrett case, the plaintiff was a wheel moulder in the employ of Lenoir Car Works, a Tennessee corporation. He brought the action under the FELA against the Southern Railway Co. for damages on account of silicosis alleged to have been contracted from

inhalation of silica dust which he claimed permeated the foundry of the Lenoir Car Works where he was employed. His theory was that the car works was the "alter ego, subsidiary, adjunct, agent or instrumentality" of the railroad, and that the railroad exercised such control over the car works as to require a determination that the railroad was his employer within the meaning of the FELA. The Court of Appeals sustained the holding of the trial court that the evidence failed as a matter of law to sustain plaintiff's theory. That was in spite of the fact that the railroad owned the entire capital stock of the car works. It was noted that:

(1) The railroad did not dictate the management of the car works.

(2) A substantial part of the business of the car works was with companies other than the railroad.

(3) The car works owned no rolling stock, and was not a common carrier by railroad within the contemplation of the FELA.

(4) The car works performed no switching or transportation functions, or any other non-delegable duties of a railroad.

"It was distinctively a manufacturer, performing no common carrier operations."[6/]

Based upon such considerations, it was held that the trial court was fully

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6/ The quotation is from 278F. 2d, at 425.

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justified in determining that "the facts did not reveal such intimacy and inseparability of control as would lead to the conclusion that the Southern Railway Company and Lenoir Car Works were one and the same." (278 F. 2d, at 245).

The facts in the Fawcett and Garrett cases were much stronger in favor of the plaintiff on this issue than they are in the present case. In each of those cases, the plaintiff's corporate employer was a wholly owned subsidiary of the defendant railroad; whereas, as has already been pointed out, the Railroad here owned no stock whatever in the Equipment Corporation.

While the federal courts are alert to protect railroad employees from attempts to defeat their rights

under the FELA, the cases above cited show that they will not arbitrarily disregard the separate entity of the corporations. The Court of Appeals said in the Ruberiod cases, supra"

> "...The doctrine of separate entity fills a useful purpose in business life and the courts are hesitant to disregard it unless the facts demonstrate some misuse of the corporate privilege or the need of limiting it in order to do justice. . ." 193 F. 2d. at 122.

This case is distinguishable on the following grounds from the authorities relied upon by the plaintiff:

(1) This is not an action where there was an issue of fact as to whether the plaintiff was in truth an employee of the railroad, rather than of a third party, at the time he was injured, as was the case in Baker v. Texas & Pacific Ry. Co., 359 U.S. 227, 79 S.Ct. 664, 3 L.Ed. 2d 756 (1958); and in Ward v. Atlantic Coast Line R. Co., 362 U.S. 396, 80 S.Ct. 789, 4 L.Ed 2d 820 (1960). As has already been previously mentioned, it was stipulated that the plaintiff was the employee of the Equipment Corporation, rather than the Railroad, at the time he was injured.

(2) This is not a case where an employee of a railroad was injured as a result of the negligence of a third party performing non-delegable operational activities for the railroad under contract

with it, as occurred in Sinkler v. Missouri Pac. R. Co., 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed. 2d 799 (1958). The plaintiff here was not an employee of the Railroad, and there was no claim that he was involved in or connected with any kind of activity, operational or otherwise, the Equipment Corporation was doing for the Railroad at the time in question.

After the Court reached the definite conclusion that the Railroad was entitled to a judgment as a matter of law on the basis of the proof presented on the trial, it took considerable additional time to research matters of which is might take judicial notice to determine if anything was overlooked in the production of the evidence here that would indicate the existence of any

device at the time of plaintiff's injuries which had the purpose or intent to enable the Railroad to exempt itself from liability to its employees under the FELA in violation of 45 U.S.C., Sec. 55.[7/] This was done in spite of the fact that there was no motion or suggestion that the Court judicially notice anything not proved in this case.[8/] The matters studied in connection with judicial

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7/ 45 U.S.C.A., Sec. 55 provides in pertinent part: "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void..."

8/ Ginsberg v. Thomas, 10 Cir., 170 F.2d 1 (1948).

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notice were the records of the Court in prior[9] cases involving the question of whether this same railroad was attempting to devise a scheme to exempt itself from liability to its employees under the FELA; salient facts of local history which are matters of general knowledge[10]; and prominent geographical features in the judicial district over which it has jurisdiction[11].

The Court made the research under the impression that it could not consider such judicially noticed facts in determining the judgment to be entered, because

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9/ Ginsberg v. Thomas, supra, note 8; Fletcher v. Evening Star Newspaper Co., App.D.C., 133 F.2d 395 (1942); Howard v. St. Louis-San Francisco Ry.Co., 8 Cir., 361 F.2d 905 (1966), cert. den. 385 U.S. 986.

10/ Long v. City of Wichita Falls, Tex.S.Ct., 176 SW 2d 936; Lewis v. San Antonio River Authority, Tex.Civ.App., 343 SW2d 475, 66 SW2d 347, writ dis.

the absence of a motion or suggestion that judicial notice be taken made it impossible to get those facts in the record. However, federal courts have consistently supported the humanitarian purposes of the FELA; and the Court had in mind that it could grant a new trial if it should conclude that an injustice was done by reason of the actual existence of a device intended to exempt the Railroad from its responsibilities under the FELA.

The Court found no facts of which it could take judicial notice which would indicate that the situation as to the question under discussion at time of plaintiff's injuries was any different from that presented by the evidence on

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11/ Barker v. Intercoast Jobbers & Brokers, Tex.S.Ct., 417 SW2d 154; Terminal R. Asso. of St. Louis v. Kimbell, 8 Cir., 105 F.2d 962; 600 California Corp. v. Harjean, D.C.N.D.Tex., 284 F.Supp. 843.

the trial. The conclusion on the alter ego issue above stated, based entirely upon the evidence, will therefore stand.

A second reason why the Railroad is entitled to a judgment as a matter of law is that the plaintiff is estopped to assert a claim against the Railroad under the FELA by reason of his having successfully prosecuted a claim under the Texas Workmen's Compensation Act on account of the injuries involved in this case. That remedy was inconsistent with a claim under the FELA because he had to be an employee of the Equipment Corporation to collect workmen's compensation benefits. South Buffalo Ry. Co. v. Ahern, 344 U.S. 367, 372, 73 S.Ct. 340, 97 L. Ed. 395 (1953); Heagney v. Brooklyn Eastern District Terminal, 2 Cir., 190 F. 2d 976 (1951); Mooney v.

Stainless, Inc., 6 Cir., 338 F. 2d 127 (1964); Lindsey v. T. & N.O. R.Co., Tex. Civ.App., 87 SW 2d 864, no writ history; Guillory v. Livingston Ship Building Co., Tex.Civ.App., 433 SW 2d 515, err. re. n.r.e., cert. den. 395 U.S. 909; International Shoe Company v. Marcus, Inc., Tex.Civ.App., 410 SW2d 235, err. ref. n.r.e.

The plaintiff argues that the Texas Workmen's Compensation Act permits a suit for damages for personal injuries by an injured workman against a third party tort-feasor after he had collected benefits under the Act for his injuries. An injured workman does have a right to collect his workmen's compensation and then sue a third party tort-feasor in a common law action for damages, subject to the subrogation rights of his

employer's compensation carrier. Traders & General Ins. Co. v. West Texas Utilities Co., Tex.Com.App., 165 SW 2d 713; Independent Eastern Torpedo Co. v. Herrington, Tex.Com.App., 95 SW 2d 377.[12/] However, the Railroad in this case was not a third-party tort feasor. There is no claim that it was guilty of any act or omission that contributed in any way to cause plaintiff's injuries. The plaintiff's theory in this case is that it was the negligence of his employer, the Equipment Corporation, which caused his injuries. The Workmen's Compensation Act provides the exclusive remedy for an employee

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12/ The opinions in each of the cases cited were adopted by the Texas Supreme Court, thereby making them opinions of that Court.

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covered thereby where his injuries are caused only by the negligence of his employer.[13/] Lotspeich v. Chance Vought Aircraft, Tex.Civ.App., 369 SW 2d 705, err. re. n.r.e.

The Court is of the opinion that the plaintiff's motion for judgment on the verdict on the issue of liability should be overruled, and that the defendant's motion for judgment notwithstanding the verdict should be granted. It is accordingly so ordered. Such rulings make action on the other motions unnecessary.

A judgment will be entered for

13/ The only exception to this rule is where the injuries result in death and are caused by gross negligence of the employer.

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the defendant in accordance herewith.

Signed, October 9, 1973.

s/ Leo Brewster
JUDGE

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-968

JOE T. BARRERA,

Petitioner,

v.

ROSCOE, SNYDER AND PACIFIC RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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March 4, 1975.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

To the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at *503 F.2d 1058*, and the opinion of the district court at *385 F. Supp. 455*.

QUESTION PRESENTED

Petitioner, plaintiff in the trial court, here continues an effort, rejected both by the United States District Court for the Northern District of Texas and by the Fifth Circuit, to constitute himself an employee of respondent railroad, thus making him eligible to recover damages against respondent, for an on the job injury, under the Federal Employers' Liability Act, *45 U.S.C.* §*51, et seq.*

Petitioner concedes that he is an employee of a non-railroad corporation (which, contrary to the statement at p. 3 of the petition for certiorari, is not a "wholly owned subsidiary," or even a subsidiary, of respondent), and that he was working solely for his employer on the occasion of his accident. His theory for obtaining FELA coverage is to contend that his employer is a sham, paper corporation, dominated by respondent and established by respondent to avoid liability under the FELA, and that, accordingly, the employer's corporate entity may be disregarded and petitioner considered an employee of respondent. The jury found (1) that petitioner's employer was an "alter ego" of respondent but (2) that it was not established to avoid FELA liability; on respondent's motion, the district court rendered judgment, notwithstanding the "alter ego" finding, that petitioner take nothing from respondent.

After hearing oral argument, the Fifth Circuit affirmed; the per curiam opinion of the panel (Circuit Judges Rives, Gewin, and Goldberg) reads in full as follows:

> "We have given careful consideration to the contentions of the parties as set forth in their well-prepared briefs and further amplified at oral argument. It is our opinion that the district court arrived at the proper conclusion and that the appellant has not presented any valid basis for reversal. Accordingly, the judgment entered for appellee by the district court is affirmed." (*503 F.2d 1058*, copied at petition for certiorari 19.)

The question presented to this Court is whether it will grant certiorari to review the Fifth Circuit's decision when (1) petitioner could point to no evidence in the Fifth Circuit, and points to none here, which could cast any doubt whatever upon the

district court's holding, dispositive of the case, that as a matter of law petitioner's employer was not an alter ego of respondent; and (2) the jury's finding that the employer was not established to avoid FELA liability is fully supported by the evidence, was not attacked by the petitioner in the Fifth Circuit, and is not attacked here, and, therefore, conclusively establishes against petitioner an essential element of petitioner's case; and (3) the evidentiary ruling complained of by petitioner was correct and, in any event, could not have affected the outcome of the case.

STATEMENT OF THE CASE

At all times material to this case, petitioner's employer, RSP Railway Equipment Corporation (called in the record and herein the "Equipment Corporation") was a duly organized Texas corporation located in Roscoe, Texas, and engaged in the business of repairing and manufacturing railway equipment. The railroad which was defendant below, respondent here, is Roscoe, Snyder and Pacific Railway Company, whose principal place of business is in Snyder, Texas. Although the petition for certiorari essentially asks this Court to substitute its view of the evidence for that of the district court and the Fifth Circuit, and hold that the corporate entity of the Equipment Corporation is simply a device to enable respondent to evade the FELA, petitioner does not give this Court an adequate summary of the material facts or the proceedings below. Accordingly, the following brief statement is submitted.

Respondent was chartered in 1906; extending some 31 miles between the West Texas towns of Snyder and Roscoe, the railroad serves as a connecting line between two large railroads, the Texas Pacific and the Gulf, Colorado & Santa Fe. (Def. Ex. 1; R. 256,

396.) Respondent had always had a repair shop for its own equipment, and in the early 1960's, when a number of other railroads in the area closed their shops, respondent's shop began to do more and more repair work on railroad equipment for other companies. In fact, this business prospered to the extent that, by 1966, 43.24% of respondent's gross sales came from its shop operations, only about 3% of which was for work done on respondent's own equipment. (R. 349, 501, 505.)

This very magnitude, however, made it difficult for respondent to continue operating such a business. In the first place, it was necessary to borrow considerable amounts of money for shop operations, and, under Interstate Commerce Commission regulations, respondent could not borrow in excess of $20,000.00 — far less than the repair business needed. (R. 352, 356, 494.)* Another problem was that railroads are limited by American Associations of Railroads policy to charging break-even prices for car repair, and respondent's officers thought a car repair business of this size ought to be able to make a profit. (R. 495, 514.) Still another difficulty was that ICC regulations would not permit respondent to set up a separate account for repair shop income, so there was no way for respondent to comply with ICC accounting rules and at the same time obtain an accurate picture of the financial condition of the shop. (R. 444-445, 447, 497, 514; Def. Ex. 22.) Also, some of the members of the Wooten family, which owned respondent in 1966, did not want the railroad to be in the car repair business — they did not want it

*The record indicates that the ICC would not permit a railroad to borrow an amount equal to more than 5% of its capital, and since respondent's capital stock in 1966 amounted to $400,000.00, it could not borrow more than 5% of $400,000.00 — $20,000.00. (R. 493.)

committed to borrow large sums of money, were apprehensive that the railroad's charter was being violated when almost 50% of its income came from shop operations, and did not consider that car repair was really a proper part of railroading. (R. 318, 319, 483). For all of these reasons, respondent, as of January 1, 1967, placed the repair shop into a wholly owned subsidiary, RSP Railway Equipment Corporation — the "Equipment Corporation."*

The status of the Equipment Corporation, as a wholly owned subsidiary of respondent, lasted for about two years. Early in 1969, the Wooten family sold the railroad, and, on March 26, 1969, the new owners caused the railroad to declare a dividend of its Equipment Corporation stock to the holding company, RSP Holding Company, which had acquired the railroad. The result is that, since March 26, 1969, respondent has not owned any stock of the Equipment Corporation at all. The two are subsidiaries of the holding company; they have no common officers or directors, and none of the officers or personnel of respondent has anything to do with the management or operation of the Equipment Corporation. (R. 362-365, 517-520.)

Turning now to petitioner's claim that he sustained injury while "employed" by respondent, it is undisputed that petitioner, a laborer, has never worked for respondent; that he was first

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*At the time of this spin-off, respondent gave notice of termination of employment to substantially all of its employees engaged in the shop operation, and instructed such employees to make application for employment with the Equipment Corporation if they desired to enter such employment. About seventy persons, being most but not all the employees filing such applications, were employed by the Equipment Corporation as of January 1, 1967. (R. 40, 399.)

employed by the Equipment Corporation in 1968, worked elsewhere for a brief period in 1970, and was reemployed by the Equipment Corporation in the spring of 1970 (by which time, as we have seen at p. 5 hereof, the Equipment Corporation had ceased to be a subsidiary of respondent); and that he was an employee of the Equipment Corporation on May 14, 1971. (Def. Ex. 1, 3; R.138-139, 214, 504.) On that date, there occurred the accident which has given rise to the present suit: it is undisputed that said accident resulted when, in the course and scope of petitioner's employment, he slipped and fell while washing a railroad car owned by J. M. Huber Corporation of Borger, Texas, a customer of the Equipment Corporation. (Pl. Ex. 11; R. 138-140.) Petitioner does not contend that there is any connection between J. M. Huber Corporation and respondent.

At the trial, elements of petitioner's theory for being considered an employee of respondent were submitted to the jury, at petitioner's instance, by two special interrogatories, which inquired (Question No. 1) whether the Equipment Corporation was an "alter ego" of respondent and (Question No. 2) whether the Equipment Corporation was created to enable respondent to escape liability under the FELA. As can be seen in the Appendix to this brief (p. 15 hereof), where the interrogatories and answers are copied in full, Question No. 1 was answered by the jury in favor of petitioner, but Question No. 2 in favor of respondent.

As petitioner recognized below, the answer to Question No. 2, that the Equipment Corporation was not a device to evade the FELA, is beyond attack by petitioner. He says in his petition for certiorari that said jury finding is contrary to "copious" evidence,

but does not even support that statement with a record reference. In fact, the overwhelming weight of the evidence was that the subsidiary corporation was established for the business reasons set out at pp. 4-5 hereof, and not for the purpose of evading the FELA. (R. 334, 454, 482.) Apart from that, however, petitioner did not move for an instructed verdict or object to the submission of Question No. 2, and, so, was precluded from challenging the answer on appeal,* and did not challenge it in the Fifth Circuit.

Petitioner, therefore, was relegated in the Fifth Circuit, and is relegated here, to the jury finding, in answer to Question No. 1, that the Equipment Corporation is an "alter ego" of respondent, which finding was set aside by the district court. The petition for certiorari (p. 8) would have this Court hold that there is an "evidentiary basis" for such finding, but, the same as in his claim of "copious" evidence mentioned in the preceding paragraph, petitioner cites no such "evidentiary basis" at all. Both the district court and the Fifth Circuit found none.

In order to justify disregarding a corporate entity on the basis of "alter ego," it must be shown that the allegedly dominant corporation, the railroad here, exercised "undue domination or influence resulting in an infringement upon the rights" of the allegedly subservient corporation.** Carefully analyzing the undisputed evidence, the district court held that, as a matter of law, there was no evidence of any such domination of the Equipment Corporation by respondent and all the evidence was to

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*See *Pennsylvania National Mutual Cas. Ins. Co. v. Nathan, 361 F.2d 18, 20 (5 Cir., 1966)*, and the many cases there cited.

**_Fawcett v. Missouri Pacific Railroad Co., 242 F. Supp. 675, 678 (W.D. La., 1965), affirmed, 347 F.2d 233 (5 Cir., 1965), cert. den., 382 U.S. 907 (1965)._

the contrary. The court noted that both companies followed regular corporate procedure; that neither owned any stock in the other; that the management and operation of the two companies were different; that the Equipment Corporation was not a railroad and did not perform any "transportation functions, switching operations or any other non-delegable duties of a railroad," but was "strictly in the business of repairing and making major alterations on rolling stock of railroads from over the entire country," and that most of its business was with companies other than respondent. (*385 F. Supp. 458-459*, copied at petition for certiorari 33-35.) This analysis by the district court is supported and compelled by undisputed evidence of record. (R. 362-365, 517-519, Def. Ex. 4-12, 24, 26, 56.); it was not challenged in any respect by petitioner in his brief for appellant in the Fifth Circuit. There, as here, petitioner did not point to a single fact of record which would begin to show that respondent exercised any "undue domination" over the Equipment Corporation — either as of the date of petitioner's injury or at any other time.

In addition to this unchallenged review of the evidence, the district court cited numerous authorities in which it had been held, on similar facts, that there was no basis for disregarding a corporate entity. (*385 F. Supp. 459-461*, copied at petition for certiorari 36-45.) In particular, the court meticulously analyzed two cases in which it was held that an employee of a wholly owned railroad subsidiary, seeking FELA coverage, had failed, as a matter of law, to show the requisite dominance of the subsidiary by the railroad. *Fawcett v. Missouri Pacific Railroad Co., 242 F. Supp. 675 (W.D. La., 1965), affirmed, 347 F.2d 233 (5 Cir., 1965), cert. den., 382 U.S. 907 (1965)*, and *Garrett v. Southern Railway Company, 278 F.2d 424 (6 Cir., 1960), cert.*

den., 364 U.S. 833 (1960). The district court found that the facts of those cases were directly in point with the facts of this one, except that the present case is stronger for the railroad in that the Equipment Corporation, at the time of plaintiff's injury, was not even a railroad subsidiary. Petitioner's brief in the Fifth Circuit did not distinguish, or mention, the *Fawcett* case, the *Garrett* case, the district court's analysis of those cases, or any of the other cases relied upon by the district court.*

ARGUMENT

Petitioner's primary argument for granting certiorari is set out at p. 16 of the petition as follows:

> "The writ should be granted to make known to railroads that they may not divide their functions into subsidiaries and deny to those subsidiary employees FELA benefits, if the purpose of such division is to limit railroad liability."

Simply to state this argument is to demonstrate that, under the record here, this is no reason why the writ should be granted: by unchallenged jury finding, the Equipment Corporation was not created for the purpose of limiting railroad liability, and, by the undisputed evidence (p. 8 hereof), it does not perform any railroad functions, and, indeed, is not a subsidiary of the railroad, respondent.

The essential question in this case — whether petitioner's employer, the Equipment Corporation, was an instrumentality

*In addition to the foregoing holdings, the district court's opinion contained yet another separate, independent ground for its judgment that petitioner take nothing from respondent, i.e., that petitioner was estopped to assert his claim for FELA benefits because he had obtained workmen's compensation upon the representations that he was an employee of the Equipment Corporation and had sustained an injury compensable under Texas workmen's compensation laws. *(385 F. Supp. 462-463,* copied at petition for certiorari 52-55.) This independent ground for the district court's judgment was not challenged or mentioned by petitioner in the Fifth Circuit, and is not challenged or mentioned here.

or adjunct of respondent, so that its corporate entity should be disregarded and all its employees deemed to be employees of respondent — has been fully considered and correctly decided by the courts below.

As we have seen at p. 7 hereof, the first essential element of proof of an "alter ego" or instrumentality relationship would be undue dominance of the Equipment Corporation for the benefit of respondent. Having concluded that no evidence of such dominance was shown in this case, but that, on the contrary, the undisputed evidence is that the Equipment Corporation and respondent were separately administered, the courts below were authorized and required to respect the corporate entity of the Equipment Corporation. Other cases, involving parent and subsidiary, have so held in the context of an injured employee of the subsidiary seeking FELA protection. See *Kelley v. Southern Pacific Company, 486 F.2d 1084, 1085 (9 Cir., 1973), remanded on other grounds, ... U.S. ....., 95 S. Ct. 472 (1974)*; Brooks v. Southwestern Transportation Company, 494 F.2d 1271 (6 Cir., 1974); Fawcett v. Missouri Pacific Railroad Company, 242 F. Supp. 675 (W.D. La., 1965), affirmed, 347 F.2d 233 (5 Cir., 1965), cert. den., 382 U.S. 907 (1965); Garrett v. Southern Railway Company, 278*

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*In *Kelley*, the Ninth Circuit held that the plaintiff had failed to show an alter ego relationship between his employer, PMT, and the railroad, respondent, and, in this Court, the employee "abandoned his claim that PMT's status as respondent's wholly owned subsidiary should render respondent liable generally for injuries to PMT employees." See footnote 2 of this Court's opinion. The plaintiff in *Kelley* contended here that he should be considered the railroad's employee because he was doing work which was the contractual and franchise responsibility of the railroad and because he was using the railroad's work area and equipment and was under the supervision and control of railroad personnel. *42 U.S. Law Week 3573 (1974)*. Petitioner has never made any similar contention, and these factors are not present in our case.

F.2d 424 (6 Cir., 1960), cert. den., 364 U.S. 833 (1960); Williams v. Chicago & Eastern Illinois R. Co., 300 N.E.2d 766 (Ill. App., 1973); Turpin v. Chicago, B. & Q.R. Co., 403 S.W.2d 233 (Mo., 1966), cert. den., 384 U.S. 1003 (1967). As pointed out by the district court, without challenge from petitioner, our case is stronger even than these, because the Equipment Corporation, at the material time,* was not a subsidiary of respondent, and the two had no common officers, directors, or employees. As recognized by the courts below, this failure of petitioner to present any evidence of the necessary dominance is, in and of itself, fatal to his claim that he should be regarded as an employee of respondent.

Even if petitioner had produced any evidence of undue dominance, however, the courts below still would have been required to render a take nothing judgment against him. In order to justify disregarding a corporate entity on common law grounds of "alter ego," it is not enough merely to show undue dominance, it also must be established that the dominance was used to perpetrate some kind of fraud or wrongdoing. *Krivo Industrial Supply Company v. National Distillers & Chemical Corporation, 483 F.2d 1098, 1103, 490 F.2d 916 (5 Cir., 1974); Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991, 995 (5 Cir., 1972), cert. den., 409 U.S. 848 (1972); Steven v. Roscoe Turner Aeronautical Corporation, 324 F.2d 157, 160 (7 Cir., 1963).* This element of petitioner's case was found against him by the jury; the only fraud

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*It is undisputed that, in determining whether one corporation is the alter ego of another, the material time is the time of the transaction complained of — i.e., in this case, the date of petitioner's injury. *Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991 (5 Cir., 1972), cert. den., 409 U.S. 848 (1972).* As of that date, May 14, 1971, it was more than two years since the Equipment Corporation had been a subsidiary of respondent.

or wrongdoing even suggested by petitioner was his contention that the Equipment Corporation was created by respondent to evade the FELA, and the jury found, in answer to Question No. 2, that exemption from FELA liability "was not one of the purposes of the creation" of the Equipment Corporation — which finding is fully supported by the evidence and beyond challenge on appeal by petitioner.

The only other reason assigned by petitioner for granting the writ is set out in the petition for certiorari (p. 14) as follows:

> "The writ of certiorari is necessary in this case to prohibit trial courts from admitting collateral benefits in FELA cases. Additionally, circuit courts should discourage such practice rather than holding that since the trial court has concluded petitioner was not covered by FELA, the evidence admitted was harmless."

Petitioner's reference is to the Fifth Circuit's not sustaining his assignment of error directed to the admission of his workmen's compensation claim in evidence — an alleged error which, he urged to the Fifth Circuit, was prejudicial on "the damage issue." (Petitioner's brief for appellant in Fifth Circuit 21.)* Petitioner's argument here, quoted above, seems to be that the Fifth Circuit, even after correctly concluding that petitioner was not a railroad employee as a matter of law, nevertheless should have reversed on an immaterial evidence ruling in order to "discourage" such rulings in the future. The federal appellate courts, however, on appeal and certiorari, are duty bound to render judgment without regard to alleged errors which could not have affected the outcome of the case, *28 U.S.C. §2111; Allen v. Pearson, 415 F.2d 499, 502 (5 Cir., 1969); Smith v. Travelers Insurance Company, 438*

*Petitioner's position in the Fifth Circuit was that he was entitled to judgment on liability and a new trial on damages.

F.2d 373, 375 (6 Cir., 1971), cert. den., 404 U.S. 832 (1971); the Fifth Circuit properly held that petitioner had "not presented any valid basis for reversal." *503 F.2d 1058,* copied on p. 2 hereof.*

CONCLUSION

Petitioner having failed to prove his theory for being considered a railroad employee, the judgments below, that he take nothing from respondent under the FELA, were right. Petitioner has shown nothing, and there is nothing, which would merit review of those judgments by this Court.

Respectfully submitted,

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*This, however, is not to say that, under the circumstances here presented, it was even error to receive evidence of petitioner's claim for workmen's compensation. Such evidence has been considered by the courts in determining whether the plaintiff should be regarded as a railroad employee, see e.g., *Edwards v. Pacific Fruit Express Company, 390 U.S. 538, 543 (1968); Valentine v. South Coast Corporation, 218 F. Supp. 148 (E.D. La., 1963), affirmed, 334 F.2d 244 (5 Cir., 1964),* and in this case was admitted on the defense of estoppel, an independent ground for the judgment which has never been challenged by petitioner. (See p. 9 hereof.)

PROOF OF SERVICE

I, JACK PEW, JR., one of the counsel for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of March, 1975, I served a copy of the foregoing Respondent's Brief in Opposition by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Mr. Aubrey L. Roberts, Jr., P. O. Box 638, Sweetwater, Texas 79556, counsel for petitioner.

JACK PEW, JR.

APPENDIX

Copied below are the special interrogatories submitting petitioner's theory of recovery, together with the jury's answers thereto:

QUESTION NO. 1:

Do you find from a preponderance of the evidence that the RSP Railway Equipment Corporation was an alter ego of the defendant, Roscoe, Snyder and Pacific Railway Company on May 14, 1971?

ANSWER:

(X) It was an alter ego.

( ) It was not an alter ego.

In connection with this question, you are instructed as follows:

"Alter ego" is a Latin term which, as used in the context of this case, means "a second self". If you find from a preponderance of the evidence that at the time of the occurrence in question in this case the defendant Railway Company exercised undue domination or influence over the Equipment Company for the benefit of the Railway Company to the extent that there was an infringement of the rights of the Equipment Corporation and that the Equipment Corporation was therefore merely an adjunct of said Railway Company, then the Equipment Corporation was the alter ego of the Railway Company. Ordinarily, a corporation is a legal entity separate and apart from its stockholders, and the mere ownership of all the stock of one corporation by another, and the identities of the officers or directors of one with the other, are not, standing alone, sufficient to create the identity of corporate interests necessary to justify a finding that one of them is a mere adjunct, or second self, of the other without separate identity. However, the matters of identity of stock ownership and of officers and directors are circumstances which may be properly considered in determining the alter ego question.

QUESTION NO. 2:

Do you find from a preponderance of the evidence that one of the purposes of the defendant, Roscoe, Snyder and Pacific Railway Company, in the creation of the RSP Railway Equipment Corporation was to enable such defendant to exempt itself from liability for damages for personal injuries to its employees under the provisions of the Federal Employers' Liability Act?

ANSWER:

( ) The exemption from such liability was one of the purposes of the creation of RSP Railway Equipment Corp.

(X) The exemption from such liability was not one of the purposes of the creation of RSP Railway Equipment Corp." (R. 633-634.)